

# THE RIGHT TO INSPECT PUBLIC RECORDS IN OHIO

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This article will analyze the general right of the public to examine the various records, data, and documents maintained by public officials in the files of the many governmental entities throughout Ohio. This right obtains from a distinct body of law which should not be confused with the various discovery rights of parties in litigation or any other right of access gained through compulsory legal process. For the most part, the analysis will be limited to the general right to inspect public records established by § 149.43 of the Revised Code, though it will include a brief review of the early common law on the subject in order to aid understanding of the current legal framework. An effort will be made to cite specific examples of both public and nonpublic records. There are both technical and policy arguments supporting the proposition that most, but not all, governmental records should be available for public inspection. In this regard, the interests of the inquiring public, the limited need for governmental confidentiality, and the right to privacy of the person who is the subject of governmental record-keeping will be explored. Another section of the article will be specifically devoted to the effect of the recently enacted statutory right to individual privacy on the right to inspect public records. Finally, this article will outline the various remedies available for enforcement of the right of inspection.

## I. THE COMMON-LAW DEVELOPMENT

Courts in both England<sup>1</sup> and the United States<sup>2</sup> have recognized a common-law right to inspect public records. In England there was some dispute whether there was a broad general right of inspection or whether this right was limited to those who possessed a special or direct private interest to be served by inspection, as well as whether inspection was limited to those records or parts of records that af-

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<sup>1</sup> 24 AM. & ENG. ENCY. OF LAW RECORDS 182 (2d ed. 1903); *People ex rel. Henry v. Cornell*, 47 Barb. 329 (N.Y. Sup. Ct. 1866).

<sup>2</sup> *State ex rel. Colescott v. King*, 154 Ind. 621, 57 N.E. 535 (1900); *Boylan v. Warren*, 39 Kan. 301, 18 P. 174 (1888); *Brown v. Knapp*, 54 Mich. 132, 19 N.W. 778 (1884); *Burton v. Tuite*, 78 Mich. 363, 44 N.W. 282 (1889); *State ex rel. Thomas v. Hoblitzelle*, 85 Mo. 620 (1885); *In re Caswell*, 18 R.I. 835, 29 A. 259 (1893); *State ex rel. Ferry v. Williams*, 41 N.J.L. 332 (1879); *State ex rel. Wellford v. Williams*, 110 Tenn. 549, 75 S.W. 948 (1903); *Gleaves v. Terry*, 93 Va. 491, 25 S.E. 552 (1896).

fects that interest.<sup>3</sup> Much of the confusion reflected in the incongruous holdings in the English cases was probably due to the unusual enforcement procedures available and the limited right of the public to seek redress of an alleged wrong rather than the substantive nature of the right involved.<sup>4</sup>

In America, most of the early cases that contained discussions of the common law either concluded that the general rule in England did not require a special or direct private interest<sup>5</sup> or rejected this restrictive requirement as not necessarily binding upon the courts of this country.<sup>6</sup> In these cases the controversy generally concerned the issue of which persons possessed the right to inspect a public record rather than whether a particular document was in fact a public record and thereby subject to inspection.<sup>7</sup>

In the early American cases the courts premised the general right to inspect public records upon various concepts such as citizenship, municipal corporation theories, and "public trust" concepts. Courts that based the right upon citizenship held that the mere status of citizenship or residency within a political entity vested in the person seeking inspection a right to examine public records of that entity.<sup>8</sup> Other courts buttressed this rationale by pointing to the absence of any statutory prohibition of public inspection.<sup>9</sup> Arguments seeking to create a distinction between the status of a mere citizen and that of a taxpayer appear to have fallen on deaf ears.<sup>10</sup> The municipal corporation theory was quite similar to the citizenship theory, embodying the idea that an individual has a right to inspect public records merely because he is a member of the municipal corporation.<sup>11</sup> Finally, courts relying upon the concept of a "public trust" theorized that a public official is elected or appointed to act on behalf of the people he or she serves and merely holds public records in trust for the public who, as beneficiaries of this trust, may inspect this property in the

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<sup>3</sup> See Stewart, *The Right to Examine Public Records*, 37 CENT. L.J. 395 (1893).

<sup>4</sup> For a brief discussion of this see *Wells v. Lewis*, 12 Ohio Dec. 170, 175 (Super. Ct. 1901), citing *State ex rel. Ferry v. Williams*, 41 N.J.L. 332 (1879).

<sup>5</sup> *E.g.*, *People ex rel. Henry v. Cornell*, 47 Barb. 329 (N.Y. Sup. Ct. 1866).

<sup>6</sup> *E.g.*, *State ex rel. Ferry v. Williams*, 41 N.J.L. 332 (1879).

<sup>7</sup> See generally *Wells v. Lewis*, 12 Ohio Dec. 170 (Super. Ct. 1901).

<sup>8</sup> *E.g.*, *State ex rel. Thomas v. Hoblitzelle*, 85 Mo. 620 (1885); *Gleaves v. Terry*, 93 Va. 491, 25 S.E. 552 (1896).

<sup>9</sup> *Burton v. Tuite*, 78 Mich. 363, 44 N.W. 282 (1889); *Wells v. Lewis*, 12 Ohio Dec. 170 (Super. Ct. 1901).

<sup>10</sup> See, *e.g.*, *Wells v. Lewis*, 12 Ohio Dec. 170, 176 (Super. Ct. 1901), citing *Ruffner v. Commissioners*, 12 Ohio Dec. Reprint 571 (Super. Ct. 1856).

<sup>11</sup> See, *e.g.*, *People ex rel. Henry v. Cornell*, 47 Barb. 329 (N.Y. Sup. Ct. 1866); *Wells v. Lewis*, 12 Ohio Dec. 170 (Super. Ct. 1901).

absence of an overriding governmental interest against inspection.<sup>12</sup>

In Ohio, the common-law right to inspect public records has been recognized since the earliest reported cases.<sup>13</sup> In the absence of a statutory provision to the contrary, this common-law right has been subject only to the conditions that any inspection must not endanger the safety of the record or unreasonably interfere with the discharge of the duties of the public official having custody of the records.<sup>14</sup> Public records have been available for inspection by anyone regardless of whether or not they had some special or direct private interest in their contents.<sup>15</sup> The right to make copies of public records appears to have always been a corollary to the right to inspect.<sup>16</sup>

The great preponderance of early Ohio cases, like those of other jurisdictions, primarily examined the nature of the right of inspection and the issue of which persons were entitled to this right rather than whether a particular document was in fact a public record. In recent years, the focus of debate has shifted dramatically to the issue of whether a particular record or document is a public record.<sup>17</sup> This area of volatile controversy is an offspring of the Ohio public records statute, which was enacted to codify and clarify the longstanding common-law right to inspect public records in this state. Although this article will attempt in part to examine the need for further judicial or legislative clarification of the right to inspect public records, it is not intended to be critical of the basic purpose of legislative steps already taken in this area.

## II. THE OHIO STATUTE

In Ohio, as in many other states,<sup>18</sup> the General Assembly has

<sup>12</sup> See *Krickenberger v. Wilson*, 3 Ohio N.P. (n.s.) 179 (C.P. Darke Cty. 1905). See also, *State ex rel. Patterson v. Ayers*, 171 Ohio St. 369, 371, 171 N.E.2d 508, 509 (1960).

<sup>13</sup> See, e.g., *Wells v. Lewis*, 12 Ohio Dec. 170 (Sup. Ct. 1901); *Krickenberger v. Wilson*, 3 Ohio N.P. (n.s.) 179 (C.P. Darke Cty. 1905); *State ex rel. Withworth Bros. Co. v. Dittey*, 12 Ohio N.P. (n.s.) 319 (C.P. Franklin Cty. 1911); *State ex rel. Sullivan v. Wilson*, 24 Ohio L. Abs. 208 (C.P. Hamilton Cty. 1937).

<sup>14</sup> See *Krickenberger v. Wilson*, 3 Ohio N.P. (n.s.) 179 (C.P. Darke Cty. 1905); *Wells v. Lewis*, 12 Ohio Dec. 170 (Super. Ct. 1901).

<sup>15</sup> *State ex rel. Louisville Title Ins. Co. v. Brewer*, 147 Ohio St. 161, 70 N.E.2d 265 (1946).

<sup>16</sup> See *State ex rel. Sullivan v. Wilson*, 24 Ohio L. Abs. 208 (C.P. Hamilton Cty. 1937).

<sup>17</sup> See, e.g., *Dayton Newspapers, Inc. v. City of Dayton*, 45 Ohio St. 2d 107, 341 N.E.2d 576 (1976); *State ex rel. Patterson v. Ayers*, 171 Ohio St. 369, 371, 171 N.E.2d 508 (1960).

<sup>18</sup> Forty-four states have statutes granting access to public records. ALA. CODE tit. 41, § 145 (1958); ALASKA STAT. § 09.25.110 (1973); ARIZ. REV. STAT. ANN. § 39-121 (1974); ARK. STAT. ANN. § 12-2804 (1968); CAL. GOV'T CODE § 6253 (West Supp. 1976); COLO. REV. STAT. ANN. § 24-72-203 (1973); CONN. GEN. STAT. ANN. § 1-19 (Supp. 1976); FLA. STAT. ANN. § 119.01 (Supp. 1976); GA. CODE ANN. § 40-2701; HAWAII REV. STAT. § 92-51 (Supp. 1975); IDAHO CODE § 9-301 (1947); ILL. ANN. STAT. ch. 116, § 43.103a (Smith-Hurd Supp. 1976); IND. ANN. STAT. § 5-14-1-3 (Burns 1974); IOWA CODE ANN. § 68A.2 (1973); KAN. STAT. ANN.

codified the right to inspect and copy public records. Section 149.43 of the Revised Code, enacted in 1963, defines a "public record" and regulates the availability of such records in the following terms:

As used in this section, "public record" means any record required to be kept by any governmental unit, including, but not limited to, state, county, city, village, township, and school district units, except records pertaining to physical or psychiatric examinations, adoption, probation, and parole proceedings, and records the release of which is prohibited by state or federal law.

All public records shall be open at all reasonable times for inspection. Upon request, a person responsible for public records shall make copies available at cost, within a reasonable period of time.<sup>19</sup>

Two years later the General Assembly enacted a series of statutes designed to clarify the status of the Ohio Historical Society and to provide additional guidelines regarding the availability of "public records" stored in a records center or archival institution.<sup>20</sup> As part of this legislation, the General Assembly further refined the definition of "public records" by defining a "record" in section 149.40:

Any document, device, or item, regardless of physical form or characteristic, created or received by or coming under the jurisdiction of any public office of the state or its political subdivisions which serves to document the organization, functions, policies, decisions, procedures, operations, or other activities of the office, is a record within the meaning of sections 149.31 to 149.44, inclusive, of the Revised Code . . . .<sup>21</sup>

In light of these statutory enactments, it is clear that the general right to inspect "public records" in Ohio applies to all three branches

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§ 45-201 (1973); KY. REV. STAT. ANN. § 171.650 (1973); LA. REV. STAT. ANN. § 44.31 (1951); ME. REV. STAT. tit. 1, § 405 (1964); MD. ANN. CODE art. 76A, § 2 (1975); MASS. GEN. LAWS ANN. ch. 66, § 10 (Supp. 1975); MICH. COMP. LAWS ANN. § 750.492 (1968); MINN. STAT. ANN. § 15.17(4) (Supp. 1976); MO. ANN. STAT. § 109.180 (Vernon 1966); MONT. REV. CODES ANN. § 59-512 (1970); NEB. REV. STAT. § 84-712 (1971); NEV. REV. STAT. § 239.010 (1975); N.H. REV. STAT. ANN. § 91-A: 4 (Cum. Supp. 1973); N.J. STAT. ANN. § 47:1A-2 (Supp. 1976); N.M. STAT. ANN. § 71-5-1 (Supp. 1975); N.C. GEN. STAT. § 132-6 (1974); N.D. CENT. CODE § 44-04-18 (1960); OHIO REV. CODE ANN. § 149.43 (Page 1969); OKLA. STAT. ANN. tit. 51, § 24 (1962); ORE. REV. STAT. § 192.030 (1975); PA. STAT. ANN. tit. 65, § 66.2 (1959); S.C. CODE ANN. § 1-20.2 (Cum. Supp. 1975); S.D. COMPILED LAWS ANN. § 1-27-1 (1974); TENN. CODE ANN. § 15-304 (1973); TEX. REV. CIV. STAT. ANN. art. 6252-17a(3) (Supp. 1975); UTAH CODE ANN. § 78-26-2 (1953); VA. CODE ANN. § 2.1-342 (Cum. Supp. 1976); WASH. REV. CODE ANN. § 39.04.100 (1972); WIS. STAT. ANN. § 19.21(2) (1972); WYO. STAT. ANN. § 9-692.2 (Cum. Supp. 1975).

<sup>19</sup> OHIO REV. CODE ANN. § 149.43 (Page 1969).

<sup>20</sup> *Id.* § 149.31-.99.

<sup>21</sup> *Id.* § 149.40.

of government<sup>22</sup> and to governmental entities at all levels. Although there may be ample room for dispute concerning whether a particular record is public and thereby subject to inspection, in the absence of a specific statutory exclusion<sup>23</sup> there can be little dispute about whether the particular governmental entity involved is subject to the coverage of the act. Whether a particular item is a "record" is also easily resolved, since the General Assembly has defined a "record" very broadly, including "[a]ny document, device or item, regardless of physical form or characteristic . . . which serves to document . . . activities of the office . . . ."

Section 149.40 defines a "record" and is not designed to assist in deciding whether a particular record is in fact a "public record."<sup>24</sup> Therefore, in examining the issue of what constitutes a public record one must be careful to limit the analysis to § 149.43, and thus not extend the right of inspection to all "records" as defined in § 149.40.

With certain enumerated exceptions, the General Assembly chose to define a public record merely as "any record required to be kept by any governmental unit."<sup>25</sup> The ambiguous language of this enactment did little to clarify the extent of the common-law right. This definition of a "public record" presents two primary questions. First, what does the word "kept" mean in this context? Second, how does one determine which records are "required" to be kept by a particular governmental unit? Thus quite a dilemma is posed for all public officials who stand between the inquiring public and a record which is neither clearly public nor clearly confidential.

It is difficult to determine what law or rule the General Assembly envisioned as the proper referent of the phrase "required to be kept." The only general statutory provision regarding the making and preservation of records in existence at the time of this enactment applied to departments of state and merely provided that each department was required to keep such "records and journals as may be necessary to exhibit its official actions and proceedings."<sup>26</sup> Of course, the Revised Code contained a plethora of specific statutory instances

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<sup>22</sup> These are the legislative, executive, and judicial branches. Perhaps mention should be made here of the "fourth branch," the multitude of administrative agencies, boards, bureaus, commissions, etc., which are also included in the broad sweep of the term "any governmental unit" used in § 149.43.

<sup>23</sup> See, e.g., OHIO REV. CODE ANN. § 109.57 (Page Supp. 1975), which specifically excludes many records required to be kept by the Bureau of Criminal Investigation.

<sup>24</sup> There has been some analytical confusion in this respect. See note 33 *infra* and accompanying text.

<sup>25</sup> OHIO REV. CODE ANN. § 149.43 (Page 1969).

<sup>26</sup> Section 154-18, General Code, which provided in part: "Each department shall provide for the keeping, within such department, of such records and journals as may be necessary to exhibit its official actions and proceedings." Act of April 26, 1921, 109 Ohio Laws 109.

of "records" which were required to be kept by various governmental units.<sup>27</sup> But any comprehensive determination of the proper extent of the statutory right to inspect public records had to await judicial interpretation of the statute.

It should also be noted here that the statutory scheme in Ohio is considerably different than that employed in the Federal Freedom of Information Act.<sup>28</sup> The Federal Act is more comprehensive and provides that, subject to nine categorical exemptions,<sup>29</sup> identifiable records of governmental agencies shall be made available to any person upon request.<sup>30</sup> In contrast, the Ohio law is very brief and certainly more ambiguous. Because of the important differences in statutory schemes, it would be imprudent to rely upon federal case law in attempting to argue other than policy considerations in disputes concerning alleged public records in Ohio.

### III. RECENT OHIO CASE LAW

The first reported case construing the Ohio public records statute was *Curran v. Board of Park Commissioners*.<sup>31</sup> This court of common pleas decision shed considerable light upon the phrase "required to be kept" by holding that "public records are those records which a governmental unit is required by law to keep *or which it is necessary to keep in discharge of duties imposed by law*."<sup>32</sup> Although this limited holding would have been a logical and practical solution to the issue at hand, the court continued its analysis and in the process created a certain amount of unnecessary confusion. The first confusing aspect of this opinion was the court's extension of the statutory right of inspection to all records, as defined in § 149.40, and not only those defined as public in § 149.43 of the Revised Code.<sup>33</sup> The other confusing aspect of this case was the creation of the distinction that documents originating outside of the governmental unit involved are not public records.<sup>34</sup> This established an unfortunate precedent,<sup>35</sup>

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<sup>27</sup> See, e.g., OHIO REV. CODE ANN. § 4715.08 (Page 1954) (certain Dental Board records); OHIO REV. CODE ANN. §§ 3701.04, 3701.09, 3701.15 (Page 1971) (certain Department of Health records); OHIO REV. CODE ANN. § 1545.08 (Page Supp. 1975) (Park Board records); OHIO REV. CODE ANN. § 109.22 (Page 1969) (records in the Attorney General's Office).

<sup>28</sup> 5 U.S.C. § 552 (1970), *as amended*, (Supp. IV, 1974).

<sup>29</sup> *Id.* § 552 (b)(1)-(9).

<sup>30</sup> *Id.* § 552(a).

<sup>31</sup> 22 Ohio Misc. 197, 259 N.E.2d 757 (C.P. Lake Cty. 1970). The plaintiff in this case was seeking to compel the defendant Board to open up all of its records for public inspection, especially the appraisals contained in the defendant's land acquisition files. The court denied inspection, holding that these materials were not public records as defined in § 149.43.

<sup>32</sup> *Id.* at 199, 259 N.E.2d at 759 (citations omitted) (emphasis added).

<sup>33</sup> *Id.*

<sup>34</sup> *Id.* at 199, 259 N.E.2d at 760.

<sup>35</sup> See 71 OHIO ATT'Y GEN. OP., No. 053 (1971), which cites this passage with approval.

since the issue of whether the land appraisals at issue in *Curran* are public records should not depend upon their origin. Assuming the result in this case was proper, it would have been more analytically sound to conclude that these records were not "required to be kept" by the Park Board and were for this reason not subject to inspection. However, this aspect of the reasoning contained in this opinion has never been reviewed or rejected by an appellate court.

The first case in which the Ohio Supreme Court discussed the definition of a public record was *State ex rel. Grosser v. Boy*.<sup>36</sup> In this case, the appellants were seeking to obtain a list of the names and addresses of all students in a particular high school and also a list of those students taking a course called "Street Literature". In its per curiam opinion, the court reversed the court of appeals and held that the records in question were clearly required by statute to be maintained and were therefore open to public inspection. Because of the clear-cut statutory record keeping requirements pertaining to the information sought, the court was not required to engage in any novel or substantial analysis of § 149.43. The court merely equated "kept" with "maintained" and held that, since the records in question were required *by statute* to be kept,<sup>37</sup> they were public records under the "required to be kept" provision of § 149.43.<sup>38</sup>

Perhaps the most intriguing aspect of the *Grosser* opinion was the rather curt reference to an envisioned "competing right to individual privacy."<sup>39</sup> It is probable that this important issue will arise in a future dispute over public records, since the General Assembly has recently enacted privacy legislation<sup>40</sup> which will be relevant to whether certain records should be disclosed pursuant to § 149.43. This new legislation will be more fully discussed in a later section of this article.<sup>41</sup>

The most recent and clearly the most important Ohio Supreme Court case concerning the issue of what constitutes a public record was *Dayton Newspapers, Inc. v. City of Dayton*.<sup>42</sup> Finally, thirteen years after the passage of the public records statute, the court was presented an excellent opportunity to clarify what constitutes a public record when no specific statutory provision applies to the "record" in controversy.

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<sup>36</sup> 42 Ohio St. 2d 498, 330 N.E.2d 442 (1975).

<sup>37</sup> OHIO REV. CODE ANN. §§ 3317.021, 3319.32, 3321.12 (Page 1972).

<sup>38</sup> 42 Ohio St. 2d 498, 500, 330 N.E.2d 442, 444 (1975).

<sup>39</sup> "The instant case does not require us to weigh the effect of R.C. 149.43 upon any breach of a competing right to individual privacy." *Id.* at 500 n.2, 330 N.E.2d at 444 n.2.

<sup>40</sup> OHIO REV. CODE ANN. §§ 1347.01-.99 (Page Current Service 1976).

<sup>41</sup> See section V *infra*.

<sup>42</sup> 45 Ohio St. 2d 107, 341 N.E.2d 576 (1976).

The debate in *Dayton Newspapers* concerned whether the daily “jail register” or “log”<sup>43</sup> maintained by the Dayton Police Department was a public record open to inspection under § 149.43. Appellees urged the Court to construe “required to be kept” to mean that the record must be required by statute—or at least, by the official policy of a unit of government—to be kept.<sup>44</sup> In rejecting this argument, Justice William B. Brown stated for the court that he would be more readily inclined to adopt this construction if § 149.43 stated “required by law to be kept.”<sup>45</sup> Justice Brown conceded that the phrase “required to be kept” is ambiguous and that the reason for its insertion in the statute is not readily apparent;<sup>46</sup> nonetheless the court accepted the argument of appellants that a “record required to be kept” should be construed to mean “any record which but for its keeping the governmental unit could not carry out its duties and responsibilities; that the *raison d’être* of such record is to assure the proper functioning of the unit.”<sup>47</sup> In reversing the lower court decision, the court held, as stated in its syllabus: “A record is ‘required to be kept’ by a governmental unit, within the meaning of R.C. 149.43, where the unit’s keeping of such record is necessary to the unit’s execution of its duties and responsibilities.”

The court also recognized in *Dayton Newspapers* the philosophical underpinnings of the right to inspect public records:

The rule in Ohio is that public records are the people’s records, and that the officials in whose custody they happen to be are merely trustees for the people; therefore anyone may inspect such records at any time, subject only to the limitation that such inspection does not endanger the safety of the record, or unreasonably interfere with the discharge of the duties of the officer having custody of the same.<sup>48</sup>

The opinion appears to lend considerable guidance in resolving the issue of what is and what is not a public record. Indeed, the court even stated that it had adopted the extremely clear position that, since “doubt should be resolved in favor of disclosure . . . , records should be available to the public unless the custodian of such records can show a legal prohibition to disclosure.”<sup>49</sup> But this position is not

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<sup>43</sup> The following information was contained in the jail log: arrest number, name of prisoner, charge, date, time, and disposition. *Id.* at 107, 341 N.E.2d at 576.

<sup>44</sup> *Id.* at 108, 341 N.E.2d at 577.

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> *Id.* at 108-09, 341 N.E.2d at 577.

<sup>48</sup> *Id.* at 109, 341 N.E.2d at 577-78 (citations omitted).

<sup>49</sup> *Id.* at 110, 341 N.E.2d at 578 (citation omitted) (emphasis added).



stated in the syllabus, nor is it necessary to the result. Moreover, the statutory provision that only those records "required to be kept" are subject to disclosure would be read out of the statute under this approach. Thus it is submitted that the true significance of this case is its clarification of the statutory standard of what makes a record public, as stated in the syllabus agreed to by the court, rather than the dictum in the opinion that would lead one to ignore the statutory limits contained in the definition of a "public record."

However, upon application of this standard, one very thorny problem remains. Since the court has construed the phrase "required to be kept" to mean that the governmental "unit's *keeping* of such record is necessary to the unit's execution of its duties and responsibilities," it has done nothing to clarify the significance of the word "kept" in the statutory definition.

For several reasons, the term as used in this statute should be construed to mean the maintenance of the record over time. First, a "record" is normally distinguished from other writings in that it is useful because of its maintenance and availability at all times. This is the usefulness of the jail log in *Dayton Newspapers*, as opposed to inter-office memoranda that are necessary to the agency's functions in order to communicate information rather than to document facts or activities for the future. Second, although the definition of a record in § 149.40 does not use the word "maintenance," it does limit the definition of a "record" to an item "which serves to *document*" the activities of the governmental unit, and therefore does not embrace items which merely communicate information; moreover it is reasonable to conclude that the General Assembly intended to convey this common meaning of the word "record" when it limited the statute's effect only to records "required to be kept."

Finally, strong policy considerations weigh in favor of restricting access to many everyday communications among governmental employees and outsiders which are not intended to be formal records for any future purpose. These considerations include both preserving the ability of governmental employees to communicate freely—and to propose hypothetical courses of action—as well as keeping governmental employees from the burden of searching files for items that are of little use to the public in understanding the agency's activities. Thus the right to inspect public records, as interpreted in *Dayton Newspapers*, should extend only to items which are necessary to the agency because of their usefulness in documenting information for future use.

This analysis of the "required to be kept" element of the statute is consistent with the view of the Ohio Supreme Court in *Dayton*

*Newspapers.* The jail log in question in that case was undoubtedly required to be maintained in order for the police to adequately and properly carry out their duty to operate the city jail. There would be no reasonable or practical means of operating the city jail without having a record of who was being detained, a means of identifying the prisoners and the reason why each individual prisoner was being detained, and a record of the date of each prisoner's entry and exit from the facility. Finally, as noted by the concurring justices in *Dayton Newspapers*,<sup>50</sup> constitutional considerations prevent the police from incarcerating an American citizen while keeping such information secret.

Thus there are two reasons why the jail log in question was and should have been held to be a public record: the record was "required to be kept" both by the needs of the agency and by the dictates of the Constitution. However, even though either line of reasoning would suffice to make a record public, statutory analysis should prove to be dispositive of the issue in the great majority of situations. With this in mind, an attempt will now be made to discuss specific examples of both public and nonpublic governmental records.

#### IV. SCOPE OF THE STATUTE

##### A. *Specific Examples of Public Records*

In the operations of government at the state level, the vast majority of civil records in which the public would have an interest are maintained by the various departments of state or numerous administrative agencies which have been created by the General Assembly. Many people have an interest in the voluminous records maintained by the judicial branch, but there is little question that almost all of these records are open to inspection.

It would be helpful to categorize the various types of records about which there is little question in regard to public inspection. Taking the "ordinary" department of state or administrative agency, board, or commission as an example, it appears that the following types of records must be maintained for the agency to function and are thus subject to disclosure: the identity of members of the board or commission, the names and salaries of its staff, administrative rules, departmental and agency bylaws, contracts to which the entity is a party, the record of minutes of the proceedings of the entity, its finance records, a register of licensees, and a register of applicants for licenses. The list of records above is only intended to present

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<sup>50</sup> *Id.* at 110-12, 341 N.E.2d at 578-79 (Corrigan, J., concurring).

examples of public records and should by no means be considered an exhaustive listing.

*B. Specific Examples of Items that are Not Public Records*

In contrast, state departments and agencies may also possess other documents or records that should not be considered public records. A categorical listing of such types of records includes: certain inter-office and intra-office memoranda, attorney-client correspondence,<sup>51</sup> investigative work product (other than inspection reports required by statute to be kept), and letters of complaint, including the identity of the complainant. In addition to the fact that there are strong policy arguments supporting the contention that the above enumerated types of records should not be available for inspection, it would seem legitimate to conclude that none of these types of records are specifically required by statute to be kept; nor are they of the nature that but for their *keeping* the public official involved could not carry out his official duties. A comparison of the nature of the particular types of records described above with the jail log at issue in *Dayton Newspapers* leads this author to conclude that in the absence of the keeping of the items listed above the departments or agencies involved could fulfill their statutory obligations; thus they are not public records as defined by the Ohio Supreme Court in *Dayton Newspapers*.

Although the above discussion was directed primarily toward state departments and agencies involved in civil law enforcement, it should also apply to those public agencies involved in criminal law enforcement. However, if the courts do discern a difference between the nature of records maintained by officials charged with enforcing civil laws and those records maintained by officials charged with enforcing criminal laws, it would appear that civil records would be more likely to be held subject to public inspection.<sup>52</sup>

With the exception of the attorney-client correspondence category, there is certainly leeway for honest disagreement among reasonable persons in regard to whether the items listed should be considered public records under the terms of the statute. However, there are also very important policy considerations which support the conclusion that such records are not public under the statute. Therefore, these examples merit, and will receive, further discussion.

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<sup>51</sup> See generally *Rowley v. Ferguson*, 37 Ohio L. Abs. 531, 48 N.E.2d 243 (Ct. App. 1942); OHIO REV. CODE ANN. § 2317.02(A) (Page Supp. 1975).

<sup>52</sup> See 71 OHIO ATT'Y GEN. OP., No. 053 (1971).

## 1. Inter-office and Intra-office Memoranda

It is clear that inter-office and intra-office memoranda are not required by statute to be produced or maintained;<sup>53</sup> on the other hand, it is a fact of governmental life that they are widely used by public officials. Some might take the position that because such memoranda are so widely utilized they are necessary to the functioning of the agency and are therefore subject to public inspection pursuant to the "required to be kept" rationale of *Dayton Newspapers*. But there remains a basic qualitative difference between most such memoranda and the jail log at issue in *Dayton Newspapers*. It was necessary to maintain the jail log over a period of time in order to properly operate the city jail. One cannot fairly make this statement about all inter-office and intra-office memoranda.

It is necessary to recognize that there are different types of memoranda: those which reflect official positions on a particular matter, and those which lack this status or are merely tentative or exploratory in nature. The former type is necessarily required to be maintained so that they can be consistently followed, and is therefore required to be kept under the reasoning of the court in *Dayton Newspapers*. Memoranda of the latter type, being merely exploratory, do not serve to document decisions and policies of the agency and are thus not required to be kept.

As mentioned above, there is also a very important policy reason for concluding that the latter unofficial type of memoranda should not be considered a public record. The public interest would be best served by encouraging free and frank interchange among public officials. If all such exchanges were subject to public scrutiny, there would be a chilling effect which could affect the nature of such exchanges, and presumably, this would have a deleterious effect on the quality of governmental services. Thus there are both legal and policy reasons supporting the proposition that not all inter-office and intra-office memoranda should be subject to public inspection.

## 2. Complaint Letters

The above application of the holding in *Dayton Newspapers* to inter- and intra-office memoranda is equally applicable to complaint letters and their authors' identities. They are not specifically required by statute to be kept<sup>54</sup> and the governmental unit involved could

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<sup>53</sup> "[I]nter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency" are exempted from disclosure under the Federal Freedom of Information Act. 5 U.S.C. § 522(b)(5) (1970).

<sup>54</sup> This particular exemption from disclosure is also recognized by the Federal Freedom

properly fulfill its statutory obligations without maintaining complaint letters or the identity of their authors. However, licensing agencies such as the State Dental Board, State Medical Board and the Ohio Department of Health receive a considerable number of such letters, and there are those who would argue that they should be subject to public inspection. Nonetheless, however useful such letters may be to the recipient state agency, they are clearly dissimilar to the jail log in *Dayton Newspapers* and should not be considered public records.

In addition to the fact that the recipient agency can properly function without the preservation of these items, there are compelling policy reasons for maintaining a degree of confidentiality in this situation. Complaint letters may contain false and scandalous information which should not be publicized, as well as very serious allegations which need to be further investigated under cover of secrecy. Furthermore, the author of such a letter may wish to bring the information to the attention of the proper authorities without risking detection by the subject of the complaint, which could place the complainant or another person in danger. A good example of this is the registration of a complaint by a relative or friend of a nursing home patient who is purportedly being abused by the nursing home management. Another example is the employee who wishes to register a labor related complaint against his employer.<sup>55</sup> Perhaps the most compelling example is the person who anonymously informs the police of a criminal violation. In any of these situations, the mere possibility of retaliatory action should be enough to deter one from arguing that such information should be considered public. The absence of a shield from public disclosure of complaint letters would undoubtedly cause a severe chilling effect upon the supply of such information, which would not be in the best interests of criminal or civil law enforcement.<sup>56</sup>

### 3. Investigative Work Product

The last area requiring further scrutiny is that which has been loosely described as "investigative work product." It should be imme-

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of Information Act. *Id.* § 552(b)(7), as amended, (Supp. IV, 1974).

<sup>55</sup> The federal courts have recognized the need for confidentiality in employee-employer situations. *See, e.g., Texas Indus., Inc. v. NLRB*, 336 F.2d 128 (5th Cir. 1964); *Wirtz v. B.A.C. Steel Products, Inc.*, 312 F.2d 14 (4th Cir. 1962); *Clement Bros. Co. v. NLRB*, 282 F. Supp. 540 (N.D. Ga. 1968).

<sup>56</sup> It could also be argued that complaint letters are not public under the reasoning of *Curran v. Board of Park Comm'rs* in that such "records" originate outside of the governmental unit involved. However, this distinction is unsound. *See* text accompanying notes 34 and 35 *supra*.

diately noted that this is the most difficult area of analysis since these materials more clearly resemble the character of the jail log at issue in *Dayton Newspapers*.

If an agency is directed by statute to conduct investigations and maintain records of these activities, the immediate problem is what kind of records are required to be kept. Presumably, the investigator's file would include raw notes, final investigation reports, various statistical data pertaining to all investigations, complaint letters, materials relating to investigative techniques, proposed strategy of future activity, and witness statements. As a matter of policy there is a very serious question whether any of this material ought to be subject to public inspection. The potential for unnecessary harm to the character or business of the target of the investigation, to the ultimate success of the investigation, and to proper investigation and law enforcement seems inevitable if such files are subject to unlimited public inspection.

On the other hand, the nature of such materials is closely akin to the jail log in *Dayton Newspapers*. It would seem that the constitutional ramifications discussed in *Dayton Newspapers* with regard to the jail log do not attach to the contents of an investigatory file. However, the logical considerations that apply in the "required to be kept" analysis regarding investigatory files are rather similar to those regarding the jail log. A major ongoing investigation of almost any type could not be conducted without maintaining some sort of notes or records of the investigation for later use, though the extent and content of such records would vary widely. Thus it can be reasonably argued that investigatory files fall within the purview of the court's analysis of the phrase "required to be kept" in *Dayton Newspapers*.

At this point one begins to perceive a rather pure dilemma. Does the right to inspect public records outweigh the social need for a limited degree of unfettered civil and criminal law enforcement? Primarily because of the strength of the opposing policy considerations this author would conclude that, with the exception of finalized formal reports and the various statistical data previously described, these materials should not be subject to public inspection.

There is limited precedent which would support this position. In 1971, the Attorney General, in responding to a request from the Superintendent of the State Highway Patrol, rendered the following opinion:

I think it is clear . . . that the 1963 Act (Section 149.43, *supra*) was not intended to make everything in the files of any department of the State a 'public record' and that the raw case file of a Highway

Patrol investigation is not included within the meaning of that term.<sup>57</sup>

The Attorney General also noted that the Federal Freedom of Information Act provides a specific exemption for "investigatory files compiled for law enforcement purposes."<sup>58</sup>

Thus, although the Ohio courts have not been required to rule on this specific issue, it would be wise for both the public officials involved and any court which might struggle with this issue to adopt the position taken by the Attorney General.

## V. THE COMPETING RIGHT TO PRIVACY

As noted earlier, the Ohio Supreme Court's slight reference in *State ex rel. Grosser v. Boy*<sup>59</sup> to an envisioned "competing right to individual privacy" has become a reality with the passage of Amended Substitute Senate Bill No. 99.<sup>60</sup> This legislation, which will become effective on January 1, 1977, is designed to protect the rights of individuals who are the subject of information stored in government-maintained computer banks. The stated purpose of the Act is

to regulate the use of personal information by state and local governments, to create the Ohio Personal Information Control Board, to require government computer systems to give public notice of their existence, and to protect the privacy of individuals from excessive record keeping by government.

The "personal information" subject to the provisions of the Act is defined as

any information that describes anything about a person, or indicates actions done by or to a person, or indicates that a person possesses certain personal characteristics, and that contains a name, identifying number, symbol, or other identifier assigned to a person.<sup>61</sup>

The rights of a person who is the subject of a personal information system, as well as the allowable uses of such information, are fairly well established by the statute, although further refinement will

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<sup>57</sup> 71 OHIO ATT'Y GEN. OP., No. 053, at 2-183 (1971).

<sup>58</sup> *Id.* at 182, citing 5 U.S.C. § 552(b)(7)(1970). This exemption was clarified in the 1974 amendments to that section. 5 U.S.C. § 552(b)(7) (Supp. IV, 1974).

<sup>59</sup> 42 Ohio St. 2d 498, 500 n.2, 330 N.E.2d 442, 444 n.2 (1975). See also note 39 *supra* and accompanying text.

<sup>60</sup> OHIO REV. CODE ANN. §§ 1347.01-.99 (Page Current Service 1976). This legislation is very similar to, but not as comprehensive as, the Federal Privacy Act of 1974, 5 U.S.C. § 552a (Supp. IV, 1974).

<sup>61</sup> OHIO REV. CODE ANN. § 1347.01(D) (Page Current Service 1976).

certainly occur upon the adoption of the various rules which are required to follow.

The first new right of an individual who is the subject of a personal information system is his right to be aware of this fact. With the exception of those agencies whose "principle function" relates to the enforcement of criminal laws,<sup>62</sup> every state or local agency that maintains a personal information system is required, upon the request and proper identification of the inquiring person, to inform him of the existence of any personal information in the system of which he is the subject.<sup>63</sup> The agency must also allow the individual or his attorney, or both, to inspect all personal information in the system which pertains to him.<sup>64</sup> At this time the agency is also required to inform the requesting person of the uses made of any such personal information as well as the identity of any users of the information who are usually granted access to the system.<sup>65</sup>

This legislation also requires that every agency that maintains a personal information system must maintain that information with such a degree of accuracy, relevance, timeliness and completeness "as is necessary to assure fairness in any determination made with respect to the person on the basis of the information"<sup>66</sup> and to collect only such personal information as is necessary and relevant to the functions that the agency is required to perform by statute, ordinance, code, or rule.<sup>67</sup> The second major right created by this legislation concerns the right of a person to dispute the accuracy, relevance, timeliness, or completeness of any personal information pertaining to him that is maintained by an agency.<sup>68</sup> The agency is required to delete any information that it cannot verify or that it finds to be inaccurate.<sup>69</sup> If after this determination is made the citizen remains dissatisfied, he has the right to submit "a brief statement of his position on the disputed information" which the agency must include or refer to in any subsequent transfer, report, or dissemination of the disputed information.<sup>70</sup>

This legislation also restricts the permissible uses of personal

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<sup>62</sup> *Id.* § 1347.04(A).

<sup>63</sup> *Id.* § 1347.08(A)(1).

<sup>64</sup> *Id.* § 1347.08(A)(2). *See also* § 1347.08(C), (E), which place certain limitations on this right.

<sup>65</sup> *Id.* § 1347.08(A)(3).

<sup>66</sup> *Id.* § 1347.05(F), (H).

<sup>67</sup> *Id.* § 1347.05(I).

<sup>68</sup> *Id.* § 1347.09(A)(1).

<sup>69</sup> *Id.*

<sup>70</sup> *Id.* § 1347.09(A)(2).



information. Section 1347.07 of the Revised Code mandates that unless certain rather stringent criteria are met:

No state or local agency shall disclose any personal information to another state or local agency, to a federal agency, or to any person or use the information to determine individual benefits, eligibility, privileges, or rights, without the prior consent of the person who is the subject of the information . . . .<sup>71</sup>

There are four specific criteria which must be complied with before gaining access to a person's personal information maintained by an agency. These four criteria, which are cumulative in nature, are as follows:

1. The disclosure or use of the personal information is consistent with the stated purposes of the system and the stated types of uses of the information as described in the notice filed with the Department of Administrative Services or the Ohio Personal Information Control Board pursuant to Section 1347.03 of the Revised Code;
2. The disclosure or use of the personal information is authorized by rules adopted by the Department of Administrative Services or the Ohio Personal Information Control Board pursuant to Section 1347.06 of the Revised Code or is otherwise required or authorized by federal law or state statutes;
3. The disclosure or use of the personal information is a routine use of information contained in an agency personnel file;
4. The disclosure is made pursuant to a written request, identifying the person making the request, and the information disclosed indicates whether a person named in the request is employed by the agency or licensed by the agency, or both.<sup>72</sup>

Clearly, the purpose of the Act is to limit access to the large amount of personal information contained in governmental files and computers. However, there is an immediate question presented: how to construe Revised Code §§ 149.43 and 1347.07 in relation to each other. This is especially a problem in light of the provision in § 1347.07(A)(2) allowing the disclosure of information that is "otherwise required or authorized by federal law or state statutes." There will be those who will argue that because of the inclusion of this provision, anything that was previously subject to inspection pursuant to § 149.43 should remain subject to inspection. However, acceptance of this argument would destroy the fundamental purpose of this later enacted legislation—to create a viable right of privacy in regard to personal information contained in governmental files and computers.

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<sup>71</sup> *Id.* § 1347.07(A).

<sup>72</sup> *Id.* § 1347.07(A)(1)-(4).

The express limitations of access to personal information that are the heart of the privacy statute would be completely ineffectual if this information could be obtained by anyone under the public records statute. Thus it is submitted that passage of the Privacy Bill has carved a moderate, yet very important, exception out of the general right to inspect public records.

#### VI. ENFORCEMENT OF THE RIGHT TO INSPECT PUBLIC RECORDS

The nature of any legal right is to some degree determined by the remedies available for enforcement of that right. Under § 149.43, all public officials have a mandatory legal duty to make all public records available for inspection, subject only to the reasonableness of the request and provision for the safety of the record being inspected.<sup>73</sup> Section 149.43 also provides that upon request, copies of such records are to be made available within a reasonable period of time.

Because performance of this duty is specifically required by law, one may bring an action in mandamus to compel inspection of public records.<sup>74</sup> Of course, the agency involved may legitimately dispute the action based on either the nature of the record at issue or the duty to allow inspection of public records under the circumstances of the case. However, one may, upon successfully prosecuting a mandamus action to compel disclosure of public records, bring a "taxpayer's action" under Revised Code § 733.61 for the purpose of recovering attorney fees.<sup>75</sup>

It is also clear that one may seek an injunction to compel disclosure of public records.<sup>76</sup> In the past there has been some dispute as to whether mandamus or injunction was the proper remedy;<sup>77</sup> however, it appears that the Ohio Supreme Court has found either proce-

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<sup>73</sup> See *Dayton Newspapers, Inc. v. City of Dayton*, 45 Ohio St. 2d 107, 109, 341 N.E.2d 576, 577 (1976).

<sup>74</sup> OHIO REV. CODE ANN. § 2731.01-.16 (Page 1953). For a discussion of available remedies, see *State ex rel. White v. City of Cleveland*, 34 Ohio St. 2d 37, 295 N.E.2d 665 (1973).

<sup>75</sup> *State ex rel. White v. City of Cleveland*, 34 Ohio St. 2d 37, 295 N.E.2d 665 (1973). Reversing the court of appeals, the supreme court in *White* held that the appellees, already successful in their mandamus action brought under § 733.58 of the Revised Code, had met the prerequisites to a taxpayer's action under § 733.59, and could in the trial court's discretion recover attorneys' fees under § 733.61 for successfully enforcing the public rights derived from the public records statute. *But see State ex rel. Grosser v. Boy*, 46 Ohio St. 2d 184, 347 N.E.2d 539 (1976), in which the court denied a recovery of attorneys' fees in a mandamus action brought pursuant to chapter 2731 of the Revised Code, stating that this recovery is barred in the absence of a specific statutory authorization.

<sup>76</sup> OHIO REV. CODE ANN. § 2727.01-.21 (Page 1953).

<sup>77</sup> See *Curran v. Board of Park Comm'rs*, 22 Ohio Misc. 197, 259 N.E.2d 757 (C.P. Lake Cty. 1970).

dural vehicle acceptable.<sup>78</sup>

Finally, § 149.99, Revised Code, provides for a forfeiture of one hundred dollars to the state for each violation of the public records statute. The Attorney General is empowered to collect such forfeitures in a civil action.<sup>79</sup>

## VI. CONCLUSION

As one examines the extent and limitations of the right of the public to inspect records maintained by public officials in Ohio, it becomes apparent that a great deal of careful interpretation is required to apply the mandates of the public records statute to a particular situation. The Ohio Supreme Court, however, has provided a fairly workable standard which should lead the public and its officials to the conclusion that most, though not all, governmental records should be made available for public inspection.

Obviously, there are very important competing values and interests which must be balanced in properly establishing the extent of the right of the public to examine public records. Although in a democracy such as ours important philosophical consideration suggest that this right should be as broad as reasonably possible, one must not short-change bona fide concerns that certain records contained in the files of public officials should not be made public. A certain amount of confidentiality is necessary to ensure that public officials are allowed to function in a manner which best serves the interests of society. The total elimination of governmental confidentiality would create both a chilling effect on the free and frank exchange among public officials and an undue obstacle to the proper enforcement of civil and criminal law.

Finally, one must not ignore the fact that, as a result of the complexities of our society certain highly personal information pertaining to any citizen may eventually be placed in a government file or computer. The general public right to inspect governmental records should not contravene any significant right of personal privacy. Therefore, it seems certain that either the General Assembly or the courts will ultimately be forced to further clarify the delicate balance required among these competing interests.

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<sup>78</sup> *Id.*; Dayton Newspapers, Inc. v. City of Dayton, 45 Ohio St. 2d 107, 341 N.E.2d 576 (1976).

<sup>79</sup> OHIO REV. CODE ANN. § 149.99 (Page 1969).